

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 986 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

MARTARAM THAVARAJI

Versus

STATE OF GUJARAT

Appearance:

MR JM BUDDHBHATTI for Petitioner

MR SP DAVE ADDL PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 23/07/1999

CAV JUDGEMENT

#. This appeal arises out of the judgment and order rendered by the Sessions Judge, Sabarkantha at Himatnagar on 28th April, 1995 in Narcotic Case No : 1 of 1994 convicting the appellant under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the 'NDPS Act' for short) and sentencing him to undergo rigorous imprisonment for 5 years and to pay fine of Rs.50,000/- or to undergo a further simple imprisonment

of 1 year in event of default in payment of fine.

#. The facts in nutshell are that on 12th January, 1994, at about 15.00 Hrs., while the police officers were on patrolling, noticed the accused boarding from a tanker and on seeing the police, he again tried to re-board the tanker which raised suspicion in the mind of the officer concerned and therefore they accosted him. The panch witnesses were summoned. His name was asked which was disclosed as Martaram Thavarji Asari. The accused was carrying one black shoulder bag which was searched in presence of panch witnesses and Ganja leaves were found out therefrom. The person was called for weighing the contraband seized and upon weighing it was found to be 3.820 kgs along with the bag. Sample of 250 grms was drawn. The sample as well as the remaining quantity of Mudamal were seized after sealing. The sample was sent to FSL. FSL certified that it was Ganja. The accused came to be chargesheeted and then came to be prosecuted and after considering the evidence on record, the learned Sessions Judge came to the conclusion that the charge against the accused were established. The accused was therefore convicted and sentenced as stated above.

#. The appeal was argued by Mr.Buddhabhatti who is an appointed advocate. He mainly raised contention that requirements of Section 50 of NDPS Act have not been complied with. Compliance of that Section is mandatory, otherwise, the trial would stand vitiated and the accused may be acquitted. Mr.Buddhabhatti has drawn attention of this Court to the fact that the accused has already undergone sentence of 5 years R.I. and at present he is undergoing the sentence of 1 year S.I. which is ordered to be undergone in case of default in payment of fine. The accused is in jail since 12th January, 1994. It is almost 5 years and 6 months have been passed. Mr.Buddhabhatti therefore urged that alternatively the case of the accused may be considered on quantum of punishment. The accused is inflicted with highest punishment both in terms of sentence as well as the fine. Mr.Buddhabhatti has stressed on the submission that the accused is the poor man, has family to support and therefore sympathy may be shown towards him. Mr.Buddhabhatti has also drawn attention of this Court towards certain contradictory version emerging from the depositions of different witnesses and therefore urged that the conviction may be set aside or in alternative, the sentence may be reduced. Mr.Buddhabhatti has placed reliance on the following decisions;

(2) BALWINDER SINGH V. STATE OF PUNJAB 1996 SUPREME COURT CASES (CRI.) 59

(3) STATE OF PUNJAB V. LABH SINGH 1996 SUPREME COURT CASES (CRI.) 1936

(4) RAGHBIR SINGH VS. STATE OF HARYANA 1996 SUPREME COURT CASES (CRI.) 266

(5) UNREPORTED JUDGMENT OF GUJARAT HIGH COURT IN CASE OF .. MOHANLAL RAICHANDJI BISNOI rendered in Criminal Appeal No : 540 / 89 on 30th January, 1997 (Coram : N.J.Pandya & H.L.Gokhaje, JJ.)

#. Mr.Dave, learned APP appearing for the State has opposed this appeal. He submitted that the accused has already undergone the sentence. So far the fine is concerned, the accused - appellant is not able to show any mitigating circumstances. When the trial Court has imposed sentence after considering the merits of the case, using judicial discretion, this Court may not interfere with that order. So far as non compliance of Section 50 is concerned, Mr.Dave has drawn attention to this Court to deposition of the investigation officer, who has categorically stated that he had asked the accused if he wanted to be searched in presence of gazetted officer, to which the accused declined. In this regard, there is detailed cross examination and the witness has remained unshaken. Of course, the Panchnama as well as FIR are silent of this aspect. But Mr.Dave stated that there is no reason to disbelieve the investigating officer. No malafides are alleged against him and therefore, the trial court has rightly relied upon the deposition of this witness in coming to the conclusion that the requirements of Section 50 of NDPS Act have been duly complied with.

#. Having considered the rival side contentions in light of the evidence on record, it transpires that conviction by the learned Sessions Judge is well founded.

#. Considering the contentions raised by Mr.Buddhabhatti particularly regarding the contradictions, it is found that the most of the contradictions are not material. But only contradiction that requires to be considered is that Exh.13, which is a slip containing signatures of panch witness as well as the investigating officer which was placed along with Mudamal while sealing the same,

contains seal impressions which are not in conformity with the fascimile of seal sent to the FSL along with the Mudamal sent for examination. In this regard, Mr.Buddhabhatti has drawn attention of this Court to deposition of one Shankarbhai Patel Exh.26 who states that after drawing the sample from the main Mudamal quantity, the same was placed in a cloth bag and slip containing signatures of panch witness as well as the PSI was placed, thereafter it was tied up with thread and a wax seal of PSI, Shamalaji was affixed thereon. So far as the remaining quantity of the contraband was concerned, the same was placed in a paper box and the slip containing signature of panch witnesses as well as PSI was placed in it and the same was tied up with thread and wax seal of PSI, Shamalaji was affixed thereon. The witness thereafter identifies this slip as Exh.13 and identifies the signature of panch witness as well as his own signature. Mr.Buddhabhatti has shown this Court Exh.13 which contains seal impression of FSL N.C. Division, A'bad. Mr.Buddhabhatti has also drawn attention of this Court to the forwarding letter sent to FSL which contains seal impression of PSI, Shamalaji, which is different from seal impression on Exh.13. He has tried to impress upon this Court that this creates serious doubts about the FSL examination as well as the investigation and therefore, the accused may be acquitted.

#. In this regard, it must be noted that PSI does not speak of affixing any seal on the slips placed with Mudamal. He speaks of wax seal after tying Mudamal with thread. The seal impression on Exh.13 are of FSL, Ahmedabad. The two seals are different. When PSI does not speak of affixing seal on slips, it would not be proper to proceed on presumption. Under the circumstances, there is no reason to doubt the genuineness of the procedure adopted during the investigation. The deposition of PSI, if perused, discloses no any challenge to the sealing aspect and sending it to the FSL. There is no question put during the cross examination even to suggest that there is some error or lacuna in the procedure adopted for taking sample, sealing the same, sending it to the FSL and the examination and reporting by the FSL. The contention raised by Mr.Buddhabhatti, therefore, cannot be accepted.

#. Now coming to the question whether the requirement of Section 50 has been complied with or not. It must be stated that although FIR and Panchnama are silent about the same and PSI has stated in deposition in examination in chief and he had asked the accused as to whether he

wanted to be searched in presence of any gazetted officer, to which the accused denied. There is cross examination on this count and he admits that panchnama as well as FIR are silent on this. But still, he denies the suggestion that no such question was put to accused at the time of search.

#. Apart from factual aspect of whether the investigation officer had himself asked the accused of his desire to be searched in presence of a gazetted officer, the legal aspect is that he was not required to do so in the facts of the instant case. For this, Section 50 requires to be considered. Section 50 runs as under;

"50. Conditions under which search of persons shall be conducted - (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such persons without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

##. Bare reading of sub Section (1) makes it clear that the requirement of Section 50 are to be complied with when any officer duly authorised under Section 42 is about to search any person, under the provisions of Section 41, Section 42 and Section 43, he shall, if such person so requires, take such person without unnecessary delay to the gazetted officer or to any officer of any department mentioned in Section 42 or to the nearest Magistrate. It is amply clear that the provisions would be attracted where the search is to be made under provisions of Section 41, 42 and 43 of the NDPS Act.

##. It is clear that action therefore, if taken on prior information regarding commission of offence under Chapter IV of the NDPS Act, Section 50 is required to be complied with. If a man is required to be searched by an officer not acting on prior information of his involvement in offence under NDPS Act, there is no question of compliance of Section 50, as the officer taking search himself may not be certain as to what would be the outcome of the search and therefore there is no question of informing the person searched about his right to be taken to gazetted officer or to a Magistrate. That right comes in to existence only when a search is to be made under NDPS Act and that could be only when the searching officer has prior information. In other cases till narcotic contraband is found, he acts under Cr.P.C. and the search therefore would be governed by provisions of CrPC. In the instant case, the police officers were on patrol duty, out of suspicion, they intercepted the accused and on search in the presence of panch witnesses, found that the accused carried with him 3.820 kgs of Ganja. It is only at that point of time it comes to the knowledge of the police officer that offence under NDPS Act is committed. The stage of search is already over. If Section 50 is read, requirements are to be complied with when the person is "ABOUT TO BE SEARCHED" i.e. at a point of time when the officer concerned had no knowledge about the outcome of the search or about the involvement of person searched in an offence under NDPS Act. Under the circumstances, there is no substance in the argument advanced by Mr. Buddhabhatti that there was non compliance of mandatory requisites of Section 50 of NDPS Act and therefore the investigation, trial would be vitiated. In this regard, decision of Honourable Apex Court in the case of State of Punjab Vs BALBIR SINGH AIR (1994) 3 Supreme Court Cases 299 is important. In para 25, Their Lordships have observed as under;

25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows;

(1) If a police officer without any prior information as contemplated under the provisions of NDPS Act makes a search or arrest a persons in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.PC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would

not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

..... "

[EMPHASIS SUPPLIED]

##. Now taking into consideration the decision in case of T.P.RAZAAK V. STATE OF KERALA 1996 SUPREME COURT CASES (CRI.) 57, it is clear that Section 50 is held to be mandatory in cases where search is taken of a person on basis of prior information which was not the case in the facts of the instant case before this Court. It was also argued that because there is no mention in the FIR and Panchnama about the compliance of Section 50, deposition of Investigating Officer may not be accepted. For this reliance was placed on the above referred decision in the case of T.P. RAZAK (Supra). From Para 6 & 7 of the judgment, it is amply clear that this decision would apply only where the mandatory provisions of Section 50 are required to be followed unlike the present case where they are not required to be followed for the reasons discussed above and therefore, the decision in the case of T.P.RAZAK, Supra cannot help the appellant.

##. Likewise in the case of Labh Singh (Supra) also, the finding is that there cannot be any universal formula about the effect of non compliance of Section 50 by the searching officer. This decision is therefore cannot be helpful to the appellant.

##. In case of RAGHBIR SINGH Supra, the principle regarding choice of gazetted officer or Magistrate was held to be made by the police officer making the search and not by the accused. The decision has no bearing on the facts of the present case.

##. Lastly Mr.Buddhbhatti placed reliance on an unreported decision of this Court in case of MOHANLAL RAICHANDJI BISNOI rendered in MOHANLAL RAICHANDJI BISNOI rendered in Criminal Appeal No : 540 / 89 on 30th January, 1997 (Coram : N.J.Pandya & H.L.Gokhaje, JJ.), wherein it was observed that where the investigating officer admitted in his deposition that after the

appellant was accosted and when the panchnama was drawn, he did not send him to any gazetted officer which is necessary requisite under Section 50 of NDPS Act. There was non compliance of mandatory provisions as the searching officer was obliged to inform the persons to be searched. The conviction was therefore held to be vitiated. However, from the judgment, it is clear as to whether in that case, the searching officer was acting in pursuance to a prior information or not, wherein in the instant case, it is clear that officers were on patrolling and were not acting on prior information, but it was only a chance recovery therefore act of search was in ordinary course and provision of CrPC were required to be followed. Further in that case, reliance was placed on the decision of State of Punjab Vs. Balbir Singh (Supra) and it was held that it was obligatory duty to inform the persons to be searched but as stated above, if the observations of Their Lordships in the Para 15 of BALBIR SINGH case are considered, they do not help the appellant in any manner. Therefore, the decision of the Gujarat High Court relied upon by Mr.Buddhabhatti can be of no help to the appellant. Under these circumstances, so far as the merits of the appeal of conviction are concerned, no merits is found and therefore, the appeal on that count must fail.

##. Considering the alternative submission made by Mr.Buddhabhatti regarding the quantum of punishment, the appellant has also undergone a substantive sentence. He is at present undergoing sentence of S.I. on account of default in payment of fine. He has been fined Rs.50,000/-. The learned Session Judge has considered the submissions made on behalf of the appellant. The submissions that are made are that the accused has young children to feed and the learned Sessions Judge came to the conclusion that there appears no reason for inflicting lesser punishment than prescribed by law. Section 20 (b)(i) provides for punishment of R.I. for a term which may extend to 5 years and a fine which may extend to Rs.50,000/-. The learned Sessions Judge has therefore inflicted the maximum punishment prescribed for the offence.

##. In this regard Mr.Buddhabhatti has urged that the accused is a poor man. He hails from Rajasthan. He has young children to feed and large family to look after. This is his first offence, quantity of charas seized is only 3.820 Kgs.. The accused has already undergone a substantive sentence and therefore some leniency may be shown towards the accused so far as the payment of fine is concerned. He is not in position to pay the fine

otherwise, he would have paid the fine. He has been inflicted the highest punishment prescribed even in absence of good reasons therefore.

##. Having considered the submissions made by Mr.Buddhabhatti, and further considering the peculiar facts of the case, it transpires that the accused is a poor man. He did not have any belonging at the time he was searched except the black shoulder back which contained Ganja. He has undergone the substantive sentence. He could not engage his private advocate and he is represented by Mr.Buddhabhatti as an appointed advocate. The substantive sentence is already undergone, therefore, this Court feels that in facts and circumstances of the case, if fine is reduced to Rs.25,000/- and in default in payment of fine, the accused is directed to undergo S.I. for 6 months, it meet the ends of justice. Under these circumstances, following order;

##. Appeal is partly allowed. The conviction of the appellant is confirmed. The substantive sentence of 5 years R.I. is not disturbed. The fine of Rs.50,000/imposed by the trial court is reduced to Rs.25,000/- and in event of default in payment of fine, the accused is directed to undergo S.I. for 6 months instead of 1 year S.I. as directed by the Sessions Court.

Date : 23-7-1999 [A.L.Dave, J.]

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